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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. [redacted] 80

ESTATE OF MICAJAH R. REEVES, also known as M. R. Reeves, JOHN M. REEVES and ERNEST R. EARLY, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

LEE MCCANLISS,
Counsel for Petitioners.

May 20, 1950.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

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Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorables The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered on March 17, 1950, affirming a judgment of the Tax Court and holding that the Estate of M. R. Reeves is liable for Federal estate tax upon the capital of 23 trusts established by the decedent in his lifetime on the ground that they constituted transfers in contemplation of death within the meaning of Sec. 811(c) of the Internal Revenue Code.

Opinions Below

The opinion of the Tax Court is unofficially reported in 8 T. C. M. 131 and is contained in the record (pp. 155-157). The opinion of the United States Court of Appeals, Second Circuit, is reported in 180 Fed. 2nd 829 and is printed in the record (pp. 174-178).

Basis of Jurisdiction

The judgment of the United States Court of Appeals was entered on March 17, 1950, as stated above, and the basis of the jurisdiction of this court is Sec. 1254(1) of the Judicial Code, being Title 28, United States Code, Sec. 1254(1).

Statute Involved

The only statute involved is the following section from the U. S. Internal Revenue Code (28 U. S. C. A. § 11(c)):

"Sec. 811

GROSS ESTATE.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible wherever situated except real property situated outside of the United States—

• • • • • • •

"(c) Transfers in Contemplation of, or Taking Effect at, Death:—(1) General Rule.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) by trust or otherwise —

"(A) In contemplation of his death. • • •"

Summary Statement of the Matter Involved

This suit was brought in the U. S. Tax Court (p. 4) to review the determination of the respondent that the Estate of M. R. Reeves was liable for Federal estate tax upon the capital of 23 trusts (p. 149) established by the decedent on August 21, 1935. He died on September 7, 1942, at the age of 65 years. The U. S. Court of Appeals affirmed the decision of the Tax Court holding, as stated, that the trusts were established in contemplation of death (p. 176).

The Federal estate tax with the capital of the said 23 trusts included amounts to $988,595.03. The amount of such tax with the 23 trusts excluded amounts to $389,064.17. In either case of course the tax is subject to an appropriate credit for the New York estate tax.

Decedent was born July 10, 1877, at Siloam, North Carolina (135), and grew up in the home which had belonged to his ancestors for generations, (137), consisting of a plantation, a grist mill, a store and a tobacco factory which was then owned by the decedent's father and his uncle (brothers) where they and their families lived a communal life (138, 140). The properties were operated as a joint venture. Even the common kitchen and dining room were managed alternately by the two families (102).

The living expenses of the members of the two families were likewise managed on a communal basis (102, 137). The decedent's father had seven children and the decedent's uncle had two children and these all fared alike, making their purchases at the common store (138). This continued until 1888 when business reverses were experienced after which decedent's father moved to Mt. Airy, North Carolina, and his uncle continued to live at Siloam (138).

About 1900 decedent's oldest brother came to New York to engage in the textile business (199). About 1904 the

decedent joined him there (99) where they lived together until 1908 when the older brother married (131) and from that time until the decedent's death he had a room in the household of this older brother. John M. Reeves, a younger brother, came to New York in about 1917 (99, 132) and joined his two brothers and made his home with them until his marriage in about 1927 (101).

About 1922 decedent and his brother John organized in New York Reeves Brothers, Inc., a corporation which succeeded to a business they had conducted as a converter of cotton textiles with manufacturing subsidiaries.

The decedent, after he came to New York, continued to treat his property as family property and to make gifts to his many relatives, including his father, brothers, sister, nieces and nephews (104, 126, 133, 140, 157). To some he sent a check every month. A schedule of gifts from 1937 to 1942 was put in evidence (Exh. 7-G, pp. 81-2). The trial judge refused to make findings covering the greater part of this undisputed evidence (pp. 158-165). But no question was raised as to these facts.

On August 21, 1935 the decedent owned 1,902 shares of the corporation's outstanding 3,665 shares of preferred stock and 15,345 shares of its outstanding 19,753 shares of common stock. His brother John owned 298 shares of the preferred stock and 2,681 shares of the common stock. Dividends theretofore in default on the preferred stock were paid in full in June 1937 and were not in default thereafter during the decedent's lifetime (150).

On August 21, 1935 the decedent created 22 trusts and on January 2, 1940 one trust, making the 23 trusts in question (p. 41). He used a printed form, the only difference in these 23 trusts being the "beneficiary" and the number of shares of Reeves Brothers, Inc. stock transferred (No. 12, p. 39). The trustees were the decedent, his brother

John and his nephew Richard E. Reeves (No. 110, p. 38). Each of these trusts was for the benefit of a different relative of the decedent (p. 40).

On August 21, 1935, 3200 shares of Reeves Brothers, Inc. common stock were used in establishing the 22 trusts (p. 41). From time to time thereafter decedent transferred additional shares to each of these trusts so that on the date of his death 9,655 shares of Reeves Brothers, Inc. common stock had been transferred to the 23 trusts as well as 150 shares of the stock of a subsidiary, Osage Manufacturing Company (p. 41).

Appropriate gift tax returns were filed by decedent covering these transfers in trust which were audited by Internal Revenue agents up to the year 1938 and the required gift taxes were paid and retained (122-3).

The trust agreements were irrevocable (par. 3, p. 76) and there was no change in the trustees or in the principal of the trusts to the date of the decedent's death on September 7, 1942 (No. 13, p. 39). The capital of these 23 trusts which was worth much less when transferred to the trusts, had a value of $1,354,046 at the date of decedent's death and represented about one-half of the then value of his estate.

No dividends were ever paid on the common stock of Reeves Brothers, Inc. and no trust received any income prior to decedent's death but a dividend of $4.00 was paid during the fiscal year ending June 30, 1943, and a dividend of $2.00 per share for the first half of the fiscal year 1944. The net earnings of the corporation after adjustments and preferred stock dividends ranged from a deficit of 44¢ per share in 1938 to $18.88 per share in the period from 1933 to 1942 inclusive, and its net working capital during such periods increased from current assets of $962,000 and current liabilities of $468,000 in 1937 to current assets of $7,198,000 and current liabilities of $5,535,000 in 1942 (79).

The decedent, who never married, by his will executed February 18, 1938 (50), left his property to six of his relatives (48) each of whom was a beneficiary of one of the trusts in question. He died on September 7, 1942 in New York of a sudden heart attack. His health had been excellent throughout and it was stipulated that the trusts in question "were not made by the decedent in contemplation of death in so far as the condition of his health was concerned" (par. 26, p. 46).

Questions Presented

The questions herein presented are:

1. Whether the clear and undisputed proof that the transfers in question were made by decedent in accordance with the plan and program of his entire life to which he was conditioned as a child does not require a determination that such transfers were not made in contemplation of death.

2. Whether the fact that no income was received by the trusts or distributed to the beneficiaries in decedent's lifetime renders the transfers in question taxable as made in contemplation of death.

3. Whether the fact that decedent intended the transfers in question "as a substitute for testamentary disposition" can be inferred when this inference is based on the fact that decedent always had a "powerful if not always a mathematically controlling interest" in the company and the inference that decedent did not intend "to pay dividends" upon the trusteed stock "so long as decedent managed the affairs of the corporation" and when this inference is in turn based on the inference that the corporation's "ability" to pay dividends was "strongly" suggested by

the earnings statements and balance sheets, and this inference is based on the inference that "the minority stockholders might have been quite content to leave their holdings as a cumulating investment."

4. Whether the transfers in question were in contemplation of death within Section 811(c) of the Internal Revenue Code.

Reasons for Allowing Writ of Certiorari

1. The decision of the court below is probably not in accord with the applicable decisions of this court covering gifts by a decedent pursuant to his established custom or way of life. *City Bank F. T. Co.* v. *McGowan,* 323 U. S. 594, 600.

2. An important Federal question of substance involving the Internal Revenue is probably decided contrary to the very principle which *Colorado Bank* v. *Com.,* 305 U. S. 23 was intended to settle.

3. An inference upon an inference so "abhorrent to American law" is obviously made the basis for the decision in the court below construing an important revenue act contrary to the rule enunciated in *United States* v. *Ross,* 92 U. S. 281, 284, and continuously applied in contemplation of death cases. *Cronin's Estate* v. *Com.,* 164 F. 2d 561, 565 (C. C. A. 6).

4. The decision of the court below places what seems to be an absolutely arbitrary and unreasonable construction upon an important federal revenue act.

LEE MCCANLISS,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The record of the opinions of the lower courts, the basis of the jurisdiction of this court, the statute involved and a short statement of the facts are hereinabove set out.

Specification of Errors

1. The court below erred in disregarding and ignoring the proof that the decedent made the transfers in question in accordance with the plan and program of his entire life and just as he was brought up.

2. The court below erred in holding that the fact that no dividends were paid upon the trusteed stock so that no income was received by the beneficiaries could be made the basis for holding that the transfers were made in contemplation of death.

3. The court below erred in repeatedly basing inference on inference as the basis for its decision.

4. The court below erred in refusing to hold that the proof was conclusive that the transfers in question were made not in contemplation of death, but in contemplation of continuing to live just as decedent had lived all his life.

5. The court below erred in holding the transfers in question to be in contemplation of death when gift tax returns showing them were filed and audited by the respondent and gift taxes paid and retained by him and when numerous other gifts made about the same time were conceded to have been made not in contemplation of death.

Summary of Argument

I

Petitioners contend that the unquestioned proof is that the decedent was brought up imbued with the idea of family solidarity and that he lived out his life on this principle. What property he acquired he used for the benefit of all of his relatives and throughout his life made gifts and transfers to his relatives as a way of life. This precluded the transfers in question from having been made in contemplation of death. *City Bank F. T. Co.* v. *McGowan*, 323 U. S. 594, 600.

II

It is the petitioners' further contention that the fact that no dividends were declared upon the stocks placed in trust and no income received by the beneficiaries was unimportant. This is the very point that *Colorado Bank* v. *Com.*, 305 U. S. 23 settled.

III

Basing an inference upon an inference in order to establish as a fact the state of mind of decedent at the time he made the transfers in question in order to subject them to tax as made in contemplation of death is "abhorrent to American Law". *Cronin's Estate* v. *Com.*, 164 Fed. 2nd 561 (C. C. A. 6), page 565.

IV

Petitioners contend that in this case there is present none of the criteria which have been considered to be important in establishing that transfers are made in contemplation of death.

V

Petitioners claim that the fact that the decedent made gift tax returns showing the transfers in question, that such returns were audited and the gift tax paid and retained, and the further fact that other gifts both before and after the gifts in question were continuously being made which are conceded not to have been made in contemplation of death necessarily defeats the claim of the respondent here.

VI

Since the only evidence as to the state of mind of the donor in making the transfers in question is the proof that he was brought up in a communal family life and all his life distributed his property among his relatives just as he did in making the transfers in question the petitioners should have judgment.

ARGUMENT

POINT I

The decedent's way of life, fixed and determined by the way he was brought up as a child, motivated the transfers in question.

The proof of the fact that the decedent was brought up as a child in a communal family life and that he all his life treated his property as family property making gifts to his relatives continuously is set out above.

Nevertheless the court below states in its opinion (177):

> "But the record is bare of any explanation which makes the Commissioner's position seem unreasonable."

This position, we submit, is untenable. It is contrary to the known facts. To say that the way a child is brought up does not furnish any explanation of his acts as a man is just an arbitrary and unreasonable position.

Mr. Justice HOLMES in an article on "Natural Law", 32 Har. L. Rev. 40, says in part (40, 41):

> "What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life."

Mr. Justice JACKSON (with whom Mr. Justice FRANKFURTER joined in a dissent) states in *Everson* v. *Board of Education*, 330 U. S. 1, at page 24:

> "I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church."

Transfers such as the ones here in question pursuant to a way of life are based upon moral considerations and so are held to be not in contemplation of death. In *U. S.* v. *Wells*, 283 U. S. 102, the court says at page 119:

> "There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death."

This statement was quoted with approval in *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, at pages 635-6. Likewise in holding transfers not to be within the contemplation of death provision it is stated in *Topliffe* v. *Com.*, 39 B. T. A. 13, at pages 16-17: "Yet there was a family precedent for the trust." And in *Hunt* v. *Com.*, 19 B. T. A. 624, at 629:

> "His action was motivated by recognition of his moral obligation to repay her contributions and by a desire to fulfill that obligation."

And the same thought was expressed in *Keck* v. *Com.*, 10 T. C. 1121, at 1124.

We respectfully submit that the present case is a clear and vivid example of a man living his entire life and administering his property according to the conditioning of his childhood so that the transfers in question were a part of the routine of his life and not in contemplation of death. In *City Bank Farmers Trust Co.* v. *McGowan*, 323 U. S. 594, this court held that gifts from an estate of an incompetent were not in contemplation of death when made in continuance of her own policy, saying (p. 600):

> "We think the District Court was right in holding that, to the extent of $6,000 per annum, which was the sum Mrs. Vail, when competent, had regularly allowed to each of her daughters, the transfers fall without the terms of sec. (302(c)."

POINT II

Lack of income to beneficiaries.

The fact that no dividends were declared on the trusteed stock and no income received by the beneficiaries during the decedent's lifetime is not significant. This court has repeatedly so held.

But it is stated in the opinion of the court below (176):

> "His (respondent's) determination here rested upon the fact that Reeves Brothers, Inc. did not pay any dividends on its common stock until after decedent's death, although the Company's earnings statements and balance sheets strongly suggest an ability to do so."

The balance sheets are in evidence as Exhibit 6-F (pp. 79-80). They show in 1937 current assets of $962,000 and current liabilities of $468,000. They show the gradual ex-

pansion of the Company to 1942 when the current assets were $7,198,000 and current liabilities $5,535,000. Obviously such figures showing enormous expansion of business might or might not suggest to a director the wisdom of declaring a dividend.

But this is the precise point in *Colorado Bank* v. *Com.*, 305 U. S. 23, where the court reviewed the prior decisions including *Shukert* v. *Allen*, 273 U. S. 545, and held that the transfer was not in contemplation of death even though the deed of trust provided that the income should be accumulated.

And in the present instance the decedent did not provide for accumulating the income. There is nothing to even indicate that the decedent wished income withheld except the inference of the court below, and no rule of law is better settled than the fact that it cannot be inferred that trustees and directors do not do their duty. "Indeed the inference to the contrary is one of law," as was said in *Matter of Lewisohn*, 294 N. Y. 596, at 607. Since no dividend was declared on this stock in decedent's lifetime the only inference that can be properly and legally drawn is that no dividend should have been declared.

POINT III

An inference on an inference is the sole basis of the decision of the court below.

This court has repeatedly stated that the motive involved in contemplation of death cases is a question of fact. In *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630 the Court says at page 636 that the motive "is a question of fact in each case." In the present case the court below states (pp. 176-7):

> "His (Respondent's) determination here rested upon the fact that Reeves Brothers, Inc. did not pay

> any dividends on its common stock until after decedent's death, although the Company's earnings statements and balance sheets strongly suggest an ability to do so. From this fact, and from decedent's always powerful, if not always mathematically controlling, interest in the Corporation, the Commissioner inferred an intent not to pay dividends so long as decedent managed the affairs of the Corporation."
>
> * * * * * * *
>
> "For all that the record shows, the minority stockholders might have been quite content to leave their holdings as a cumulating investment."

First is inferred from balance sheets figures an ability to pay dividends. Then from this inference and the decedent's powerfully controlling position it is inferred further that the decedent intended to prevent the payment of dividends so long as he managed the affairs of the corporation: It is next inferred that this was proper because the minority stockholders might have been satisfied to "leave their holdings as a cumulating investment." From this is finally inferred a contemplation of death motive. The court infers all this even though decedent was only one of five directors (pp. 52-3), and although there were about 33 stockholders of the Company (p. 150), and some of these stockholders were trust companies (pp. 55, 71).

As stated above, an inference is required, as a matter of law, that directors and fiduciaries do their duty. *Matter of Lewisohn,* 294 N. Y. 596 at 607.

The law is firmly established that inferences of this kind cannot be based upon inferences. *U. S.* v. *Ross,* 92 U. S. 281 at 284. And the rule has been repeatedly applied in contemplation of death cases. *Allen* v. *Trust Co. of Georgia,* 149 Fed. 2nd 120, at 127, affd. 326 U. S. 630; *Cronins Estate* v. *Com.,* 164 Fed. 2d 561 (CCA-6), in which last mentioned case the court in repudiating such a procedure states (565) that it "is to indulge in that super-imposition of inference one upon another so abhorrent to American law."

POINT IV

None of the usual criteria indicative of gifts in contemplation of death are present in this case.

A

Health of Decedent

This has been repeatedlly referred to as an item to be considered in such cases beginning with *U. S.* v. *Wells*, 283 U. S. 102 at 119. Here it is stipulated (p. 46):

> "26. The aforesaid transfers in trust pursuant to the said 23 trust indentures were not made by the decedent in contemplation of death in so far as the condition of his health was concerned."

B

Time Between Making the Transfers and Death

This has also been much relied upon. As in the *Wells* case (283 U. S. 102) at page 117. And there is a statutory two year presumption. Here the decedent, as stated above, was born in July 1877. He established 22 of the trusts on August 21, 1935 (pp. 41, 150). He died on September 7, 1942.

C

Will Executed Long After Transfers in Question

As stated, 22 of the trusts were established in August 1935. His will was not executed by decedent until February 1938, 2½ years later (p. 154).

This is further evidence that the making of the transfers in question and the disposition of the remainder of his property by will were not part of any contemporaneous plan.

D

Proportion of His Estate Transferred

It is stated by the court below (p. 152) that the 23 trusts had a value at the date of decedent's death of $1,354,000 and "represented almost one-half of his estate in value." This statement gives no consideration of course to the fact that at the time of the transfers it is shown in the record (pp. 45, 33) that the property transferred at the date of transfer had a value of only about $559,000. The courts have repeatedly recognized that a transfer of such a percent of the decedent's property is not significant. *Colorado Bank* v. *Com.*, 305 U. S. 23; *Routzahn* v. *Brown*, 95 Fed. 2d 766, at 771.

E

Decedent's Long Established Policy of Making Gifts

The facts showing that decedent all his life was making gifts to his relatives and treating his property as family property are set out above. Gifts by the decedent, exclusive of the transfers in question, are set out in Schedule 7-G, pages 81-2. These cover the period 1937 to 1942. In addition, Petitioner's Exhibit 8 (p. 83) shows the gifts made by decedent to one brother in the period 1925 to 1930. Furthermore there is testimony as to gifts to other relatives from the period 1906 to 1942 (pp. 103, 104, 127, 141, 142). These gifts which were proven (exclusive of the transfers in question) over a period of 36 years amounted to a sum total of more than $185,000. As to these gifts the court below states (p. 154):

> "The decedent made a number of gifts to assist his father, his brothers, his sister, his sister-in-law and his nephews and nieces during his lifetime which

were not regarded by the Commissioner as transfers within section 811(c) or (d)."

But a regular course of conduct in the matter of making gifts was held to exclude them from the contemplation of death statute in *City Bank Farmers Trust Co.* v. *McGowan*, 323 U. S. 594, 600. And this is well established law and was the basis for the decision in *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, at 637. This rule has been consistently recognized by the lower courts.

POINT V

Estoppel.

The transfers in question were considered by the decedent and appropriately shown in his gift tax returns (p. 122). These returns were audited by the respondent up to the year 1938 (pp. 122-3). And the required gift taxes were paid and retained (p. 124).

Besides the transfers in question the decedent, as stated above, was continuously making other gifts to his relatives which were not regarded by respondent as taxable transfers.

This is much more than being inconsistent. In *Black* v. *U. S.*, 68 Fed. Sup. 74, unanimously affirmed in a *per curiam opinion* 164 Fed. 2d 583, it is said of a similar case at page 78:

> "The court having held that much earlier gifts were not made in contemplation of death is impelled to the same view regarding these later gifts because there were no intervening circumstances to indicate a premonition of death."

As a matter of fact Mr. Justice FRANKFURTER, sitting with his Circuit and writing for a unanimous court, stated in *Ross* v. *Com.*, 169 Fed. 2d 483, at pages 494-5:

> "In several instances the Commissioner has been precluded from adopting a position inconsistent with one previously taken (citing cases)."

In this case it is submitted the respondent should not be permitted to continuously take inconsistent positions.

CONCLUSION

Your petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

LEE MCCANLISS,
Counsel for Petitioners.

New York
May 20, 1950.

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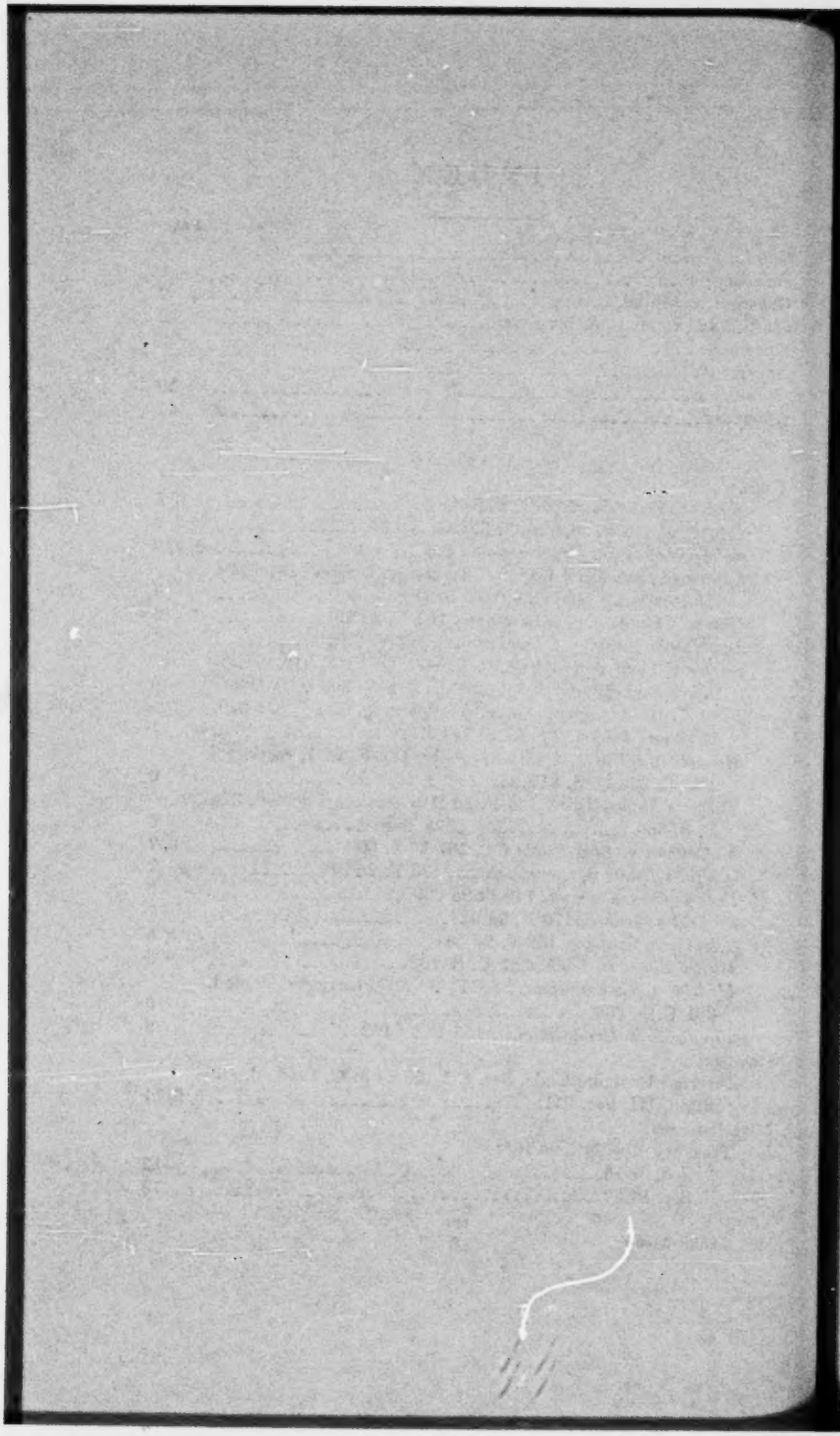

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 80

ESTATE OF MICAJAH R. REEVES, ALSO KNOWN AS M. R. REEVES, JOHN M. REEVES AND ERNEST R. EARLY, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 149–157) is not officially reported. The opinion of the Court of Appeals (R. 174–177) is reported at 180 F. 2d 829.

JURISDICTION

The judgment of the Court of Appeals was entered March 17, 1950. (R. 177–178.) The petition for a writ of certiorari was filed May 19, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the facts support the conclusion of both courts below that transfers of stock made by decedent during his lifetime were made "in contemplation of his death" within the meaning of Section 811 (c) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*, pp. 11–13.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The decedent, Micajah R. Reeves, died unmarried on September 7, 1942, at the age of 65. In 1922 he and his brother John organized Reeves Brothers, Inc. (hereafter called the "corporation"), a commission house and converter of cotton textiles. Decedent was the president, the treasurer, and a director of the corporation until his death. On August 21, 1935, the corporation had outstanding 3,665 shares of preferred stock and 19,753 shares of common. Decedent owned 1,902 shares of the preferred, and 15,345 of the common; his brother John owned 298 of the preferred and 2,681 of the common. The remaining shares were held in small blocks by about 33 other stockholders. Voting rights were vested in the common from June of 1937 until the time of decedent's death. (R. 149–150.)

On August 21, 1935, the decedent created 22 trusts, to which he transferred a total of 3,200 shares of the corporation's common stock. Each trust instrument was the same except for the name of the beneficiary and number of shares transferred. The trustees were the decedent, his brother John, and a nephew. The beneficiaries were his four brothers, his sister, the widow of a deceased brother, nephews and nieces. Of the 3,200 shares transferred by the decedent, 1,100 went to the trust for his brother John, and 100 went to each of the other 21 trusts. From time to time decedent transferred additional shares to each trust, so that the total number transferred by the time of his death was 9,655 shares. He also transferred 50 shares of stock of a subsidiary corporation to each of three of the trusts. On January 2, 1940, decedent created a twenty-third trust for a niece born in 1939. At the date of his death decedent owned 5,521 of the common stock. The next largest stockholder was his brother John who owned 2,591 shares. (R. 150–151.) The shares transferred to the 23 trusts were worth $1,354,046 at the time of decedent's death, and represented almost one-half of the value of his estate. (R. 152–153.)

The net income (dividends) of each trust was payable to the named beneficiary for life. The corpus (stock) was to go to the life beneficiary's descendants or, in default of any descendant, to

those entitled under New York intestacy law. The trustees were directed to retain and were authorized to vote the stock. Decedent reserved the power to terminate each trust at any time with the written consent of his co-trustees and the life beneficiary. (R. 151–152.)

Decedent continued to control the corporation until his death. (R. 156.) No dividends were ever paid during his lifetime on the stock comprising the corpora of the trusts, and no accounting was ever made to any court by the trustees. After decedent's death on September 7, 1942, the corporation paid a dividend of $4 per share for its fiscal year ended June 30, 1943, and $2 per share for the first half of its fiscal year 1944. The annual net earnings of the corporation on its total outstanding common stock (after taxes, renegotiation requirements, and preferred stock dividends) during the years 1933 through 1942 ranged from 19 cents to $18.88 per share, with the exception of a deficit of 4 cents per share in 1938. The net working capital during these years ranged from $307,347 to $1,663,301. (R. 153–154.)

The decedent made a number of gifts to assist his relatives during his lifetime, which the Commissioner did not regard as transfers within the meaning of Section 811 (c) or (d) of the Internal Revenue Code. (R. 154.)

The decedent's will was executed on February 18, 1938, and left 25 per cent of his estate to his brother John, 25 per cent to a niece, 15 per

cent to his sister, 15 per cent to a nephew, and 10 per cent each to two other nephews. Each of these legatees was a beneficiary of one of the *inter vivos* trusts. (R. 154.)

The Commissioner determined that the transferred stock was includible in decedent's gross estate under Section 811 (c) of the Internal Revenue Code as property transferred in contemplation of death, and also under Section 811 (d) by reason of decedent's reservation of the power to terminate the trusts with the consent of his co-trustees and the life-beneficiary. (R. 154–155.) The Tax Court found that the transfers were not made in contemplation of death insofar as decedent's health was concerned, but that they were nevertheless made in contemplation of death within the meaning of Section 811 (c). Having sustained the Commissioner's determination on this ground, the Tax Court considered it unnecessary to decide whether the transferred stock was also includible in decedent's gross estate under Section 811 (d). (R. 155–157.) The Court of Appeals affirmed. (R. 177–178.)

ARGUMENT

The decision below is in accord with established principles. There is no conflict, and no necessity for further review.

1. Section 811 (c) of the Internal Revenue Code (Appendix, *infra*) requires inclusion in a decedent's gross estate, for federal estate tax

purposes, of property transferred during his lifetime "in contemplation of his death". It is settled that this provision was designed to reach *inter vivos* transfers intended as substitutes for testamentary dispositions. *United States* v. *Wells*, 283 U. S. 102, 116–117; *Allen* v. *Trust Co.*, 326 U. S. 630, 635–636; *City Bank Co.* v. *McGowan*, 323 U. S. 594, 599; *Colorado Bank* v. *Commissioner*, 305 U. S. 23, 27; *McCaughn* v. *Real Estate Co.*, 297 U. S. 606, 608. A transfer may be a substitute for a testamentary disposition, and hence "in contemplation of death" within the meaning of the statute, even though at the time it is made the decedent is in sound health and has no thought that death is near. If the transfer is motivated by the "thought of death", rather than by "purposes associated with life", it falls within the sweep of the statute whether or not death is imminent. *United States* v. *Wells, supra,* pp. 117, 118; *Allen* v. *Trust Co., supra,* p. 635. The lower courts, including those below, have consistently applied this test.[1]

[1] *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916 (C. A. 2d), certiorari denied, 293 U. S. 565; 296 U. S. 649; 299 U. S. 582; *Vanderlip* v. *Commissioner*, 155 F. 2d 152 (C. A. 2d); *Updike* v. *Commissioner*, 88 F. 2d 807 (C. A. 8th), certiorari denied, 301 U. S. 708; *In re Kroger's Estate*, 145 F. 2d 901 (C. A. 6th), certiorari denied, 324 U. S. 866; *Pate* v. *Commissioner*, 149 F. 2d 669 (C. A. 8th); *Davidson's Estate* v. *Commissioner*, 158 F. 2d 239 (C. A. 10th); *Thomas* v. *Graham*, 158 F. 2d 561 (C. A. 5th); *Humphrey's Estate* v. *Commissioner*, 162 F. 2d 1 (C. A. 5th), certiorari denied, 332

Whether a particular transfer was made "in contemplation of death" presents a question of pure fact, no single circumstance being decisive. The Commissioner's determination is presumptively correct, the burden of proving it to be wrong rests upon the taxpayer, and the trial court's decision is not to be disturbed unless it is clearly erroneous. *Colorado Bank* v. *Commissioner, supra; McCaughn* v. *Real Estate Co., supra.*

2. Both courts below concluded that taxpayer failed to sustain the burden of proving that the transfers here involved were not made in contemplation of death, and the facts amply support that conclusion. Between 1935 and the time of his death in 1942 the decedent, who was unmarried, created 23 separate trusts in each of which he named a close relative as the life-beneficiary and the life-beneficiary's descendants as remaindermen. To each trust he transferred some of the shares of stock of a corporation of which he was the president and controlling stockholder. As trustees he named himself and two relatives, who were authorized to vote the stock held by the trust, and he continued to control the corporation

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U. S. 817; *O'Neal's Estate v. Commissioner*, 170 F. 2d 217 (C. A. 5th); *Scofield* v. *Bethea*, 170 F. 2d 934 (C. A. 5th); *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. A. 2d), certiorari denied, 320 U. S. 744; *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, 137 F. 2d 653 (C. A. 3d), certiorari denied, 321 U. S. 764.

until his death. The transfers did not aid the donees during the decedent's lifetime, nor did they serve any other lifetime purpose of the decedent. Until decedent's death the corporation declared no dividends on the stock, although it had substantial net earnings available for the purpose, with the result that while decedent lived and managed the affairs of the corporation no income whatever was received by the trusts or the beneficiaries. Almost immediately after the decedent's death dividends were declared. The record contains no explanation for the corporation's failure to pay dividends during the decedent's lifetime. (R. 149–156.) On the basis of these and all the other evidentiary facts, the Tax Court found that the inactive trusts were motivated by purposes associated with death rather than life, and were merely substitutes for testamentary dispositions to the natural objects of the decedent's bounty. (R. 155–157.) The court below reached the same conclusion on review. (R. 176–177.) Where as in this case "two courts have resolved that question of fact" the same way, their "concurrent findings" will be "accepted here without reexamination of the evidence." *Allen* v. *Trust Co., supra,* p. 636. Even if the evidence were reexamined here, under familiar rules governing the scope of appellate review of factual determinations the Tax Court's decision is entitled to

affirmance. *Colorado Bank* v. *Commissioner*, 305 U. S. 23.[2]

3. The decision below is not, as taxpayer asserts (Pet. 7, Br. 10), in conflict with *City Bank Co.* v. *McGowan*, 323 U. S. 594, and *Colorado Bank* v. *Commissioner, supra.* On the contrary, the courts below followed the very principles which this Court there reiterated. In the *City Bank* case, which involved transfers by an incompetent's estate pursuant to court order, the particular portion of the District Court's decision to which taxpayer adverts (Br. 13) is addressed to facts which bear no resemblance to those of this case; moreover, this portion of the decision was affirmed on appeal. In the *Colorado Bank* case, this Court stressed that whether a transfer is one "in contemplation of death" within the meaning of the statute presents a question of fact in each case; since the Tax Court's conclusion that the transfer did not fall in that category was supported by substantial evidence, it was held that the Court of Appeals erred in

[2] The decision below is correct for the additional reason, alternatively urged by the Commissioner (R. 155), that the transferred stock is includible in decedent's gross estate under Code Section 811 (d) (2) (Appendix, *infra*) because of his reservation of the right to terminate each trust with the consent of his co-trustees and the life-beneficiary (R. 152). The Tax Court found it unnecessary to pass on this alternative contention in view of its holding that the stock was includible in the gross estate under Section 811 (c). (R. 157.)

reversing the Tax Court. Here too the Tax Court's decision is supported by substantial evidence, and affirmance of its decision by the court below was in harmony with the holding in the *Colorado Bank* case. In *Cronin's Estate* v. *Commissioner,* 164 F. 2d 561 (C. A. 6th), upon which taxpayer also relies for conflict (Pet. 7, Br. 10), the court recognized that the question was one of fact but reversed the Tax Court's decision on the ground that it lacked evidentiary support. No such situation is here presented.

CONCLUSION

The decision below is correct, and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible wherever situated, except real property situated outside of the United States—

* * * * *

(c) [As amended by the Act of October 25, 1949, c. 720, 63 Stat. 891, Sec. 7 (a)] *Transfer in Contemplation of, or Taking Effect at, Death.*—(1) *General Rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(A) in contemplation of [illegible] death. * * *

* * * * *

(d) *Revocable Transfers*—

* * * * *

(2) *Transfers on or Prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, ex-

cept in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

* * * * *

(26 U. S. C. 1946 ed. and Supp. III, Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.16. *Transfers in contemplation of death.*—* * *

* * * * *

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, in its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

* * * * *

SEC. 81.20. *Transfers with power to change the enjoyment.*—* * *

* * * * *

The provisions of this section do not apply to a transfer if the power may be exercised only with the consent of all parties having an interest, vested or contingent in the transferred property, and if the power adds nothing to the rights of the parties as conferred by the applicable local law.

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